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No. 80-1925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED TRANSPORTATION UNION,
Petitioner,

v.

LONG ISLAND RAIL ROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the operations of a state-owned railroad, found to be "a crucial physical link with other interstate rail carriers in the movement of interstate rail freight" as well as a provider of long- and short-haul passenger service, are constitutionally shielded from the provisions of the Railway Labor Act and other federal railroad laws under the doctrine of *National League of Cities* v. *Usery*.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, reported in 634 F.2d 19, and the opinion of the District Court for the Eastern District of New York, reported in 509 F. Supp. 1300, appear in the Appendix to the Petition (hereinafter designated "Pet. App.") at pages 1a-26a and 29a-46a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1980 (Pet. App. 1a). A timely petition for a rehearing en banc was denied on December 17, 1980 (Pet. App. 27a). This Court granted the petition for writ of certiorari on June 22, 1981, and upon applica-

tion by petitioner, extended the time within which to file this Brief to September 3, 1981. The Court's jurisdiction is invoked under Section 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Constitution and the pertinent sections of the Railway Labor Act ("RLA"), 45 U.S.C. 151 *et seq.*, have been set forth in full at Pet. App. 83a, 57a, and in the Appendix to this Brief (hereinafter designated "App."), *infra* at 3a and 8a. The pertinent provisions of the New York Civil Service Law, Section 200-214 (the Taylor Law), are set forth in full at Pet. App. 49a, and in the appendix to the Respondents' Brief in Opposition to the Petition, at A1-A4.

STATEMENT OF THE CASE

A. The Parties

Petitioner[1] United Transportation Union ("UTU" or "the union") filed this action in the United States District Court for the Eastern District of New York for declaratory judgment to test whether the provisions of federal railroad labor relations law or the anti-strike provisions of the New York State Public Employees Relations Law (New York Civil Service Law, Section 200-214), apply to the Long Island Rail Road ("LIRR").

Petitioner UTU is an unincorporated labor organization, national in scope, representing the craft or class of conductors, brakemen, switchmen, firemen, motormen, collectors and related employees comprising the train crew on virtually every railroad in the United States, including

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[1] The Brotherhood of Locomotive Engineers, Railroad Yardmasters of America, Brotherhood of Railroad Signalmen, Brotherhood of Railway Carmen, International Association of Machinists and Aerospace Workers, *amici curiae* in the Court below, join in the views expressed herein.

the LIRR, pursuant to the provisions of the Railway Labor Act. UTU has been certified and recognized by the National Mediation Board as the exclusive collective bargaining representative under the Railway Labor Act for those employees within the said craft or class employed by the LIRR. It is a party to collective bargaining agreements with the LIRR governing rates of pay, rules and working conditions of employees represented by it which were negotiated and are maintained in accordance with the requirements of the Railway Labor Act, 45 U.S.C. 151 *et seq.*

Respondent LIRR is a class I railroad engaged in business as a common carrier by rail in interstate commerce subject to the provisions of Part I of the Interstate Commerce Act (49 U.S.C. § 10101 *et seq.*) and is a "carrier" within the meaning of that term as defined in the Railway Labor Act. The LIRR is an integral part of the nationwide railway system of the United States and is subject to the provisions of the Interstate Commerce Act, the Railway Labor Act, and other federal railroad laws. It connects with other interstate railroads in the movement of freight in interstate commerce.

Respondent Metropolitan Transportation Authority ("MTA"), an agency of the State of New York, controls LIRR as one of its wholly owned subsidiaries.

B. The Proceedings Below

On December 7, 1979, UTU filed this action in the District Court for the Eastern District of New York for a declaratory judgment that the LIRR was subject to the Railway Labor Act, and that the Railway Labor Act occupied the entire field of labor relations of railroads engaged in interstate commerce to the exclusion of state law, in this case the Taylor Law; and for an injunction to protect against Taylor Act intrusion into federally protected rights.

The district court granted petitioner's motion for summary declaratory judgment. It concluded that the Long Island Railroad is a carrier engaged in the transportation of freight in interstate commerce and is therefore subject to the Railway Labor Act (Pet. App. 36a). Further, it held (1) that "employees of the Railroad, who have exhausted the mandatory bargaining and mediation procedures outlined in the [Railway Labor] Act, have a federally guaranteed right to strike" (Pet. App. 39a); and (2) that the right to strike as guaranteed by the Railway Labor Act was not impaired by the fact that the employer was a state agency, relying upon *California* v. *Taylor*, 353 U.S. 553. (Pet. App. 38a).

The Court of Appeals reversed. It held that reversal was dictated by "the rationale of *National League of Cities* v. *Usery*, 426 U.S. 833" (Pet. App. 3a). It concluded that insofar as the application of the RLA to the LIRR "directly displaces the State's ability to structure employee-employer relationships and to make essential governmental decisions", it is not within the authority granted Congress by Article I, Section 8, Clause 3 of the Constitution (Pet. App. 14a). In reaching this conclusion, the court announced that the scope of essential government services for purposes of *National League* "is gauged not only in terms of the nature of a public service, but also its availability in the marketplace" (Pet. App. 22a). The court recognized that "the LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (Pet. App. 9a), but in applying the balancing test, it struck the balance in favor of the State interest (Pet. App. 25a).

C. The Challenged Federal Statute

Although the implication of this case upon the application of federal laws to state-acquired enterprises is far-reaching, the targeted statute here is the Railway

Labor Act. Enacted more than 50 years ago, it states its general purposes to be:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151a (*see* Pet. App. 59a).

The Railway Labor Act has been the subject of decisions of this Court in a long line of railroad cases dating back more than fifty years. *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, decided in 1930, upheld the constitutionality of the Act, holding, among other things, that "the major purpose of Congress in passing the Railway Labor Act was 'to provide machinery to prevent strikes'" (*Id.*, at 565) and in so doing "does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." *Id.*, at 571. As this Court has noted from time to time, in its numerous decisions on this subject[2] "the

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[2] The Act's major-dispute procedures and status quo requirement were concisely stated in *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969):

> The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2

Act established rather elaborate machinery for negotiation, mediation and voluntary arbitration, and conciliation". *Detroit, Toledo, & Shoreline R.R. Co.* v. *United Transportation Union*, 396 U.S. 142, 148-149.

> It imposed upon the parties an obligation to make every reasonable effort to negotiate a settlement and to refrain from altering the status quo by resorting to self-help while the Act's remedies were being exhausted. . . A final and crucial aspect of the Act was the power given to the parties and to representatives of the public to make the exhaustion of the Act's remedies an almost interminable process. As we noted in *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), 'the procedures of the Act are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute.'

Id., at 149 (citations omitted). For a diagram of these procedures, *see* App. D, *infra*, at 4a.

The 97th Congress in its first session extended this "interminable process" of Section 6 for the resolution of disputes involving state owned and operated commuter railroads by an additional period of at least 240 days during which the President is required, upon request by the governor of an affected state or by the parties, to establish not only an Emergency Board under

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Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

Section 10, but failing dispute resolution at that stage, a final offer selection Emergency Board (*see* App. C and F *infra*, at 3a, 8a). The *status quo* time span within which the Section 10 Board will operate has been doubled from 60 days to 120 days. The *status quo* period during which the second or final offer selection Emergency Board will operate consumes another 120 days or 240 days overall, in addition to the long time span during the usual negotiation and mediation.

The final offer selection board recommends to the President the more reasonable of the final offers submitted by the carrier and the union. *See* App. F, *infra*, at 8a-10a. The party rejecting the selected offer is penalized in the event of a work stoppage. The employees who engage in a work stoppage following their rejection of the selected final offer forfeit benefits under the Railroad Unemployment Insurance Act. The carriers upon their rejection would lose benefits under a mutual aid strike pact.

The Court in *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 390, concluded that the Railway Labor Act permits the parties to a railway labor dispute to engage in self-help, "free from State interference" after exhaustion of the "interminable" Railway Labor Act procedures.

D. The New York Public Employees Relations Law (the Taylor Law)

The New York Taylor Law, enacted in 1967, establishes a labor relations system for public employees (*see* Pet. App. 49a). It prohibits strikes by certain employees of New York State and its local subdivisions, and provides procedures for the imposition of fines or other penalties (Sec. 210, *Id.*, at 49a). It provides no substitute for the resolution of an impasse in collective bargaining. It grants public employees the right to

organize and to be represented in collective bargaining by employee organizations of their own choosing. It is administered by a three-member Public Employee Relations Board, which has the responsibility to resolve disputes concerning the representative status of employee organizations, to investigate and remedy improper employer or employee organization practices and to establish and administer procedures for the resolution of collective bargaining disputes, including the establishment of fact finding boards authorized to make public recommendations. If mediation and fact-finding fail to settle a dispute, the matter is referred to the legislative body for a public hearing and for such action as it may deem necessary.

The Taylor Law, as originally enacted, did not extend to employees of state-owned subsidiary corporations, such as LIRR. Thus, it was not until February 8, 1980, when respondents converted LIRR from a private corporation to a public benefit corporation within the meaning of the Taylor Law, that the issues presented by this case arose (*see* District Court opinion, Pet. App. 31a).

E. Facts

As appears from the averments by LIRR in the various federal district court complaints it has filed, the LIRR is:

> . . . a Class I steam railroad . . . engaged in business as a common carrier for hire in the transportation of passengers and property in interstate and foreign commerce, subject to the Interstate Commerce Act, and also intrastate commerce within the State of New York, and is a "carrier" within the meaning of that term as defined in the Railway Labor Act.[8]

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[8] *E.g.*, complaints filed in *LIRR* v. *UTU*, Civ. Action No. 75-C-747 (E.D.N.Y. 1975); *LIRR* v. *Brotherhood of Locomotive Engineers*, Civ. Action No. 74-C-102 (E.D.N.Y. 1974); *LIRR* v. *System Federation No. 156*, Civ. Action No. 68-C-688 (E.D.N.Y. 1968).

It has likewise averred in its complaints that "[t]he railroad is an integral part of the nationwide railway system and connects and interchanges freight and passengers with other railroads" (*Id.*, footnote 3).

The character of the LIRR's operations reflects the physical structure of the island whose industries and people it serves. Long Island is an elongated insular projection paralleling the entire length of the State of Connecticut. It is bounded on the north by Long Island Sound, separating it from Connecticut's south shores. The Atlantic Ocean is on its east and south and the Narrows, New York Bay and the East River form its west and northwest boundaries. Seventeen hundred square miles in size, it is larger than the state of Rhode Island. Its length is approximately 118 miles, its width, 23 miles (*see* App. A, *infra*, at 1a).

It is divided into four counties, two of which, Suffolk and Nassau, encompass most of its land mass. The combined population of these two counties exceeds 2.6 million and ranks ahead of one fifth of all the states in the United States.[4] These counties are classified by the United States Bureau of the Census as a standard metropolitan statistical area, the ninth largest in the nation.[5]

The two remaining counties on the island, Kings and Queens, occupy a small segment of the island at its western tip. They are each boroughs of New York City.

From points within these counties on its western end, the island connects with Manhattan Island and the mainland by a series of bridges. On its eastern end it is linked with Connecticut by vehicle carrying ferries.

The LIRR radiates throughout this entire land mass with 211 miles of main line track and 101 miles of

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[4] New Hampshire, Vermont, Rhode Island, North and South Dakota, Wyoming, Idaho, Montana, Alaska, and Hawaii.

[5] *Statistical Abstract Supplement, State and Metropolitan Area Statistical Data Book*, U.S. Bureau of the Census, (1979), at 522.

branch line track, serving the towns and cities of Long Island. The most remote point of its service is the town of Montauk, the island's end point, more than 100 miles or about three hours distant from Manhattan.[6] *See also* App. B, *infra*, at 2a.

For this extensive area, LIRR is "the only common carrier railroad serving the traveling public and the numerous industries located . . . in the Counties of Nassau and Suffolk [and] is the principal common carrier railroad serving the residents of the County of Queens and the thousands of industries in that County" (averments of LIRR, contained in the complaints referred to at footnote 3, *supra*). The District Court below accordingly found that LIRR "is a necessary physical link with other railroads in the movement of a heavy volume of interstate freight via the New York City gateway between Long Island and other parts of the United States" (Pet. App. 35a; *see also* App. B). The Court of Appeals agreed, saying: "The LIRR's freight service provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (Pet. App. 9a).

LIRR is one of the oldest railroads in the United States, having been incorporated on April 24, 1834. In 1966, New York State acquired ownership of LIRR through the respondent Metropolitan Transportation Authority, by stock purchase from the Pennsylvania Railroad Company.[7] The LIRR employees remained private

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[6] *Moody's Transportation Manual* (*see* Record, hereinafter designated "R", at 410).

[7] According to the records of the United States Department of Transportation, the federal government has approved application for LIRR grants providing millions of dollars since its acquisition by the State to improve and modernize LIRR service. The figure compiled by the Department exceeds $450,000,000 for the period 1967 to 1980 (*see* R. 319; *see also Moody's Transportation Manual*, R. 410).

employees until February 8, 1980 when the MTA converted LIRR into a public benefit corporation. *See* discussion *infra*, at 40.

For the year ending December 31, 1979, LIRR generated more than $19 million from its freight operations[8] serving "numerous Long Island concerns, such as aircraft manufacturers, supermarket chains, building suppliers, food processors, and farms" (Pet. App. 34a).

Its freight includes coal, building materials, chemicals, heavy equipment, aircraft parts, radioactive material, paper products, petroleum, and farm products (Joint Appendix, hereinafter designated "J.A.", at 24-25). Its freight cars are hauled by diesel locomotives (J.A. 25).

In that same year, 1979, it reported the movement of 70,365 loaded freight cars in through trains and delivered an additional 52,283 loaded cars to rail siding throughout Long Island.[9] In transporting these cars in and out of Long Island, LIRR interchanged "with more than a dozen . . . carriers" (Pet. App. 34a), bearing the identification marks of interstate railroads from every section of the United States (*e.g.*, the Santa Fe, Southern, Florida East Coast, Maine Central, Great Northern, Union Pacific, Conrail, Norfolk & Western, Canadian Pacific, Canadian National, Chicago Northwestern, Bur-

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[8] LIRR Report for 1979 to the Interstate Commerce Commission, ("ICC"), Form OS-B, (Item 3, Line 3). *See also* J.A. 33. The court below cites a lower figure based upon an adjustment for a freight surcharge related to the Railroad Retirement Tax (*see* Pet. App. 4a; J.A. at 49-50).

[9] LIRR Report for 1979 to ICC, Form OS-A, Items 13-02, 13-03, Lines 150, 151. At the trial respondents gave a lower estimate of 40,936 cars in 1979 (J.A. at 34-36). The District Court found the differences "not material" since the lower figures "provide substantial support for the conclusion that the Railroad 'is a necessary physical link with other railroads in the movement of a heavy volume of interstate rail freight via the New York City gateway between Long Island and other parts of the United States.'" Pet. App. 35a, (citation omitted).

lington) (*see* J.A., at 25) moving over more than two million car miles[10] throughout the island.

This interconnection of interstate rail carriers reflects the regional nature of the national rail network, with interstate long-haul freight movements usually involving more than three railroads, sharing a national freight-car pool.[11] The hubs of these interstate rail movements in Long Island and throughout the entire national rail system are the yards where the freight cars are delivered, serviced, and made up into trains moving to common intermediate or final destinations. Whenever a car is set off from a train moving into or out of these yards, the car is reswitched and consolidated with other traffic into a block of freight cars and eventually joined to a train. This interchange procedure is repeated from yard to yard until the car reaches its final destination.[12]

At all times prior to the exigencies of this law suit, LIRR has considered itself a carrier subject to federal railroad laws applicable to railroads in interstate commerce.[13] *See* Pet. App., at 31a, 35a-36a. As Judge Mishler in the court below found:

> [LIRR] has consistently filed reports required by the Interstate Commerce Act with the ICC. In addi-

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[10] Bureau of Accounts, Interstate Commerce Commission, *Financial and Operating Statistics, Class I Railroads*, Statement No. 100 (1978), at 12 (J.A., at 56).

[11] *National Transportation Trends and Choices*, United States Department of Transportation, (1977), at 183.

[12] *Id.*, at 204.

[13] *E.g.*, Interstate Commerce Act, 49 U.S.C. 10501; Railway Labor Act, 45 U.S.C. 151; Railroad Retirement Act, 45 U.S.C. 231; Railroad Unemployment Insurance Act, 45 U.S.C. 351; Rail Safety Improvement Act, 45 U.S.C. 39; Railroad Boiler Inspection Act, 45 U.S.C. 22; Federal Employers' Liability Act, 45 U.S.C. 51; Labor-Management Report and Disclosure Act, 29 U.S.C. 401; Rehabilitation Act of 1973, 29 U.S.C. 794; Norris-La Guardia Act, 29 U.S.C. 101; Railroad Reorganization Acts, 11 U.S.C. 205; Regional Rail Reorganization Act, 45 U.S.C. 701; Railroad Revitalization and Regulatory Reform Act, 45 U.S.C. 801.

> tion, its employees have consistently received benefits of the Railroad Retirement Act, the Railroad Unemployment Insurance Act, and the Federal Employees [sic] Liability Act. Moreover, in the dispute which lies at the heart of this action, the Railroad has affirmatively sought to invoke the collective bargaining and mediation procedures set out in the Act, including the establishment of a Presidential Emergency Board. (Pet. App. 36a).

In addition to its interstate freight operations, LIRR has, like other Class I railroads, historically provided passenger service over the length and breadth of Long Island. In its passenger service it uses both diesel-hauled coaches and parlor and sleeping cars, as well as self-propelled rail motor cars (J.A. 25, R. 120-121; *see* Pet. App. 34a). This service includes the transportation of regular passengers traveling daily between home and work over short distances within commuting range as well as other passengers traveling as occasion requires between points as distant as 100 miles including the outermost points of Suffolk County. By LIRR's own estimate, the daily commuter group number 90,000 (J.A. 35), less than 4% of the 26 million population of Nassau and Suffolk Counties (U.S. Census, 1980), and about one half of this percentage if the population of Queens County is included. In its 1979 report to the Interstate Commerce Commission, LIRR showed the annual revenue derived from the commutation short-haul group to be approximately $71 million, and that from the basic fare group to be approximately $55 million,[14] a ratio of about five to four.

LIRR is unique in that it is the only state owned and operated Class I railroad in the United States carrying both interstate freight and the travelling public. Except for short-haul services into New York,[15] passenger com-

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[14] LIRR Report for 1979, ICC Form OS-B, Items 4-01, 4-02, and 4-03, lines 5-7, based on the sale of commutation and multi-ride tickets as compared with regular fare tickets.

[15] PATH, owned by a bi-state authority carries short-haul interstate passengers between New York City and northern New Jersey.

mutation services are provided by 12 privately owned or operated interstate railroads to and from metropolitan centers in Illinois, Massachusetts, New Jersey, Pennsylvania, Michigan, and California.[16]

The collective bargaining negotiations central to this dispute were conducted prior to the amendment of the Railway Labor Act of August 13, 1981, providing a special procedure for publicly funded and publicly operated railroad carriers providing commuter service.[17] They followed the form prescribed by the Railway Labor Act, as then in effect, as had all prior negotiations on this and all other interstate railroads since the passage of the Railroad Labor Act in 1926.

The long drawn-out traditional procedures providing the framework for collective bargaining in the railroad industry are summarized above. *See also* App. D, *infra*, at 4a. Unlike practices in industrial labor relations generally, agreements in the railroad industry are of indefinite duration. The contracts do not expire. Moratorium dates are customarily established which govern the period within which modification of provisions of an agreement cannot be processed. Upon expiration of the moratorium period, the railroads or the labor organization may serve a written notice under Section 6 of the Act identifying what, if any, changes, affecting rates of pay, rules or working conditions, it proposes to negotiate within the constraints of the Railway Labor Act procedures.[18]

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[16] *Transit Fact Book*, American Public Transit Association, (1978-1979 ed.), at 74-75; (R. 403-404). The twelve carriers are the Baltimore & Ohio, the Burlington Northern, the Chicago & North Western, the Milwaukee, the Chicago Rock Island, the Chicago South Shore, the Illinois Central, the Boston & Maine, Grand Trunk Western, Norfolk & Western, Pittsburgh & Lake Erie, and the Southern Pacific. *Id.*

[17] Omnibus Budget ReconciliationAct of 1981, P.L. 97-35, Title XI, § 1157, reproduced in App. F at 8a (*see supra*, at 6-7).

[18] See generally *The Railway Labor Act at Fifty*, National Mediation Board (U.S. GPO, 1977), at 71 *et seq.*

Petitioner served its Section 6 notices which triggered the RLA procedures on June 29, 1978, November 1 and 15, 1978, December 15, 1978, and February 16, 1979. (J.A., at 28). The RLA procedures ran their full course during the following months until April 11, 1980 when the dispute was settled (Pet. App. 6a, n.6). Throughout the 22 months intervening from service of notice to settlement, all aspects of the statutory procedures were applied. When the initial effort to settle their differences by conference failed, UTU and LIRR filed a joint application with the National Mediation Board ("NMB") on April 5, 1979. When seven months of mediation fell short of producing an agreement, the NMB terminated mediation and proffered arbitration (J.A., at 29). The action of releasing the case from mediation triggered a 30-day status quo period pursuant to Section 5 of the Act. *Id.* Efforts to settle the dispute continued throughout this phase. On December 8, 1980, the train employees represented by petitioner withdrew from LIRR service, the 30-day moratorium period having expired. *See* J.A., at 21-22, 29.

The work stoppage ended six days later on December 14, 1980 when President Carter, upon a finding that the LIRR work stoppage threatened "substantially to interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service" issued Executive Order 12182 under Section 10 of the Act. The order established Presidential Emergency Board 12182 "to investigate and report" respecting the dispute. Its effect under the Act was to impose a second status quo or moratorium period, prohibiting the continuation of the work stoppage for an additional 60 days.[19] *See* App. C, *infra*, at 3a.

Hearings before the Presidential Emergency Board were held and a report was filed in due course.[20] J.A., at

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[19] J.A. at 29.

[20] On March 4, 1980, Chief Judge Jacob Mishler of the U.S. District Court for the Eastern District of New York granted petition-

29. Thereafter, on April 11, 1980, the dispute, which underlay this action, was settled.[21] Pet. App., at 6a, n.6.

SUMMARY OF ARGUMENT

The courts below have each concluded that the Long Island Rail Road "is a necessary physical link with other railroads in the movement of a heavy volume of interstate freight via the New York gateway between Long Island and other parts of the United States." (Pet. App. 35a, 34a, 9a). Yet the decision of the Court of Appeals holds that the State of New York, in acquiring owner-

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er's motion for summary judgment and contemporaneously issued a permanent injunction restraining LIRR and MTA from pursuing its state court Taylor Law action and further restraining UTU from engaging in any work stoppage pending ultimate disposition of this case (Pet. App., at 47a-48a).

[21] On March 9, 1980, the National Mediation Board issued an interim order, announcing that, pending action by this Court in this case, it will withhold its mediatory services from contract disputes involving LIRR and its sister subsidiary, the Staten Island Rapid Transit Authority ("SIRTOA"). *See* Pet. App., at 63a. In the Board's view the decision of the Second Circuit vitiates only that part of RLA which, under the court's holding, "impairs the State's ability to structure employer-employee relationships" of LIRR, by "eliminat[ing] a key [no strike] provision in the State's legislative effort to provide its citizens with continuous public transportation" (Pet. App. 3a, 14a). NMB accordingly announced that it will continue to process LIRR representational cases under the RLA (Pet. App. 71a). Similarly minor disputes will continue to be processed under the compulsory arbitration provisions of the Railway Labor Act. *Id.*

Respondents MTA and LIRR, joined by SIRTOA, have filed an action for declaratory judgment in the federal court for the Eastern District of New York, challenging the National Mediation Board's position as to the limited scope of the Second Circuit's decision. *Metropolitan Transportation Authority et al.* v. *National Mediation Board*, Civ. 81-0721, (E.D.N.Y. filed March 11, 1981). LIRR has more recently filed a petition under the Taylor Law with the New York Public Employees Relations Board, requesting the holding of an LIRR employees' representation election in a single overall company unit. *LIRR Petition for Decertification*, Case No. C-2271 (N.Y. Public Employment Relations Board, filed June 1, 1981).

ship, effectively removed the railroad from the application of the Railway Labor Act and other related federal railroad laws. The decision is directly contrary to the decisions of this Court holding that interstate railroads operating within the continental rail network, "long recognized as the objects of national concern and regulation" (*Piedmont & Northern Railway Co.* v. *ICC*, 286 U.S. 299, 306), remain subject to federal railroad laws of general application when acquired and operated by a State. *California* v. *Taylor*, 353 U.S. 553; *United States* v. *California*, 295 U.S. 175; *Parden* v. *Terminal R. Co.*, 377 U.S. 184. These decisions were explicitly confirmed in *National League of Cities* v. *Usery*, 426 U.S. 833, 854 n. 18 in which the Court declared that:

> The holding in *United States* v. *California* . . . is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in 'common carriage by rail in interstate commerce'.

It was long ago settled by this Court that the commerce power includes the power "to control . . . all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Houston E. & W. Texas Ry. Co.* v. *United States*, 234 U.S. 342, 351 (*"Shreveport Rate Case"*).

An examination of the history of the railroad network establishes that the railroad industry has long been regarded as "a railroad world", "a 'state within a state' " with a large distinctive population with "its own customs and its own vocabulary . . . and . . . rules of its own

making . . .". *California* v. *Taylor*, 353 U.S. at 565. A growing concern with the chaotic conditions which plagued the early railroad industry in this country produced the Interstate Commerce Commission in 1887, followed by an increasing number of federal legislative responses to a wide range of national railroad problems, including the statute here in question, the Railway Labor Act. The wealth of railroad litigation involving these laws before this Court over the past hundred years attests to the extent of the national interest in the effective operation of the national rail network in its entirety.

In its recent session, Congress amended the Railway Labor Act to give further expression to the national concern in the operation of railroads like the LIRR by establishing a "Special Procedure" for "publicly funded and publicly operated carrier[s] providing rail commuter service." These new provisions require an additional extended period after exhaustion of the Section 6 and the new 120-day Section 10 procedures, in which the parties must submit "final offers". An additional 120 days of "final offer" hearings and deliberations are mandated in which the Board chooses the more "reasonable" of the offers. The parties must then either accept the Board's decision or suffer penalties in the event of a work stoppage following rejection. Omnibus Budget Reconciliation Act of 1981, Section 1157 (*see* App. F, *infra*, at 8a).

The court below held that the takeover of the LIRR by New York in 1966, and more specifically, its conversion into a public benefit corporation in 1980, removed it from the reach of federal laws affecting railroads, under the reasoning of *National League of Cities*. It rested its decision on the ground that LIRR, although functioning as a "crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" (Pet. App. 9a), also serves as an important physical link in the movement of commuters from Long

Island into New York City. The court in deviating from *California* v. *Taylor* expanded the narrow holding of *National League of Cities* in derogation of its expressly stated exclusion of interstate railroads as noted above.

This Court in *National League* limited the Tenth Amendment immunity to the application of federal statutes "insofar as . . . [they] . . . operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions" so as to "impair the States' 'ability to function effectively in a federal system' ". 426 U.S. at 852 (citation omitted). These express limitations have since been paraphrased by this Court in the form of the three requirements set out *infra*, at 36. *Hodel* v. *Virginia Surface Mining Association*, —— U.S. ——, 49 U.S.L.W. 4654, 4660. The instant claim satisfies none of them. (1) The Railway Labor Act does not regulate the States "as States"; it regulates interstate railroads, however owned. (2) It is not addressed to matters that are "indisputably attributes of sovereignty". (3) It does not impair the States' ability "to structure integral operations in areas of traditional functions".

The operation of the LIRR is not an "integral" operation of the government of New York. The LIRR functions precisely as it did before it was acquired by the State. The takeover simply effected a change in ownership. To say that the LIRR became an integral part of government merely because the State converted it to a public benefit corporation is to deprive the words of limitation in *National League* of all substantive content.

There is likewise no rational basis for the conclusion below that the LIRR meets the "tradition" test of *National League*. The United States has a long and pervasive practice of leaving railroading to the private sector. Sporadic individual ventures by a few States into direct railroading do not create a "tradition" in any reason-

able sense of that term. Nor can we have one "tradition" in one State and another in other States, each determining the scope of the federal authority to provide nationwide protection for the interstate network of rail transportation.

The States' "freedom to structure [their] integral operations" (426 U.S. at 852) is not impaired by the Railway Labor Act. The Tenth Amendment protection is limited to those operations which are " 'essential to [the States'] separate and independent existence' ". 426 U.S. at 845. The decision below would extend the criteria of essentiality to those services deemed by a State to be essential to interests of the local population because of the unavailability of such service "in the marketplace" (Pet. App. 22a). The Constitution, however, does not make market conditions the determinant of the line between federal and state authority. Nor does it require that an otherwise valid nationwide program for the protection of interstate commerce be subject to the particular "conception of public advantage" of each individual State. *Cf. Helvering* v. *Powers*, 293 U.S. 214, 227.

In *National League* the statute in question was deemed by the Court to substitute federal determinations for state determinations concerning the wages and the hours of state employees. The Railway Labor Act, in contrast, imposes no substantive standards limiting the railroads in the terms of employment they can offer. It simply requires the railroad to negotiate with its employees' representatives. *Virginia Ry. Co.* v. *System Federation*, 300 U.S. 515, 519. It does not compel agreement; the choice remains with the railroad, public or private, to decide on the terms it is willing to grant.

The Railway Labor Act is the instrument selected by Congress to avoid railroad interruptions due to labor disputes. It is based on the Congressional conclusion that the availability of ultimate economic force is a nec-

essary condition of the effectiveness of the collective bargaining machinery designed by Congress as the means of achieving that end. *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380-81. In contrast, the State of New York has chosen to prohibit strikes. This is a difference in judgment, in a field of overlapping jurisdiction, of no more Tenth Amendment significance than that considered in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 and in related federal preemption cases, which under the Supremacy Clause must be resolved in favor of the federal legislation. *Virginia Surface Mining*, *supra*, 49 U.S.L.W. at 4660. "The determination of the permissible range of self-help 'cannot be left to the laws of many States' ", for a railroad strike in one state affects the movement of freight in other states. *Jacksonville Terminal*, *supra*, 394 U.S. at 381. " 'The needs of the subject matter manifestly call for uniformity' ". *Id.* (citations omitted).

The fact, relied on by the court below, that the LIRR carries commuter passengers as well as interstate freight, does not alter the case. It is long settled that:

> Wherever the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.

Shreveport Rate Cases, *supra*, 234 U.S. at 351-52.

ARGUMENT

I. THE LIRR REMAINED, AFTER ITS ACQUISITION BY THE STATE, AN INTEGRAL PART OF THE NATIONWIDE RAILROAD NETWORK AND ITS OPERATIONS THEREFORE CONTINUED TO BE WITHIN THE WELL-ESTABLISHED AUTHORITY OF THE FEDERAL GOVERNMENT TO PROTECT AND REGULATE INTERSTATE COMMERCE.

As the court below recognizes, the LIRR "provides a crucial physical link with other interstate rail carriers in the movement of interstate rail freight via New York" [22] (Pet. App. 9a). This conclusion conforms to averments of LIRR in its complaints in a long series of earlier federal court actions that it "is an integral part of the nationwide railway system and connects and interchanges freight and passengers with other railroads" (Statement of the Case, Part E, *supra*, at 8-9).

The LIRR has always carried freight as well as passengers from the earliest days of the federal involvement with the national railroad industry. It is nowhere suggested that the role of the railroad as "an integral part of the nationwide railway system" changed in any respect upon the State's acquisition of the railroad as a going concern in early 1966. In fact, the railroad at the time of purchase, speaking through Vice-President Shultz, proclaimed that:

> Absolutely nothing has changed . . . People are pounding the same typewriters and pulling the same switches as they always have.
>
> We just have a new owner and new board of directors. We are under the Railway Labor Act just

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[22] The district court, in its findings, similarly characterized the operation of LIRR as " 'a necessary physical link with other railroads in the movement of a heavy volume of interstate rail freight via the New York City gateway between Long Island and other parts of the United States' " (Pet. App. 35a).

> as we've always been. The people do not become state employees; they remain railroad employees and retain all the benefits and drawbacks of that.[23]

Nor did the take-over by the State change the nature of the services supplied by the LIRR to the "thousands of industries" [24] on Long Island. LIRR continued to operate its diesels, freight cars, passenger coaches, parlor cars, sleeping cars and its self-propelled coaches over its 325-mile rail system, serving an area larger than the state of Rhode Island and more populous than one fifth of the states in the Union (J.A. 25-26, and R., at 120-21).

It continued to interchange freight "with more than a dozen other railroads," directly or indirectly handling, servicing, yarding and delivering freight cars from and to other states (Pet. App. 34a). In 1979, it reported to the ICC that it handled the movement of more than 70,000 loaded freight cars in through trains and more than 50,000 loaded cars to rail sidings which together with the movement of empty freight cars involved more than 2 million miles of freight car transportation. *See* Statement of the Case, Part E, *supra*, at 11.

This Court has observed that "[t]he country's railroads long ago . . . adopted the practice of shipping the same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads." *United States* v. *Allegheny-Ludlum Corp.*, 406 U.S. 742, 743. *See also United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224.[25] The LIRR cars are part of

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[23] App. E, *infra*, at 5a-7a.

[24] As characterized by LIRR. *See* Statement of the Case, Part E, *supra*, at 8-9.

[25] According to a Department of Transportation study, "[a] typical freight car requires about 24 days between loads and spends only 14% of that in a line-haul move (8% loaded and 6% empty). The rest of the time is spent in yards and terminals . . . Since over

that common pool, carrying the logos of rail carriers from the four corners of the continental United States: the Southern, the Maine Central, the Union Pacific, the Santa Fe, along with numerous other national and Canadian railroads (J.A. 25).[26]

That the Interstate Commerce Act, the Railway Labor Act, the Federal Railroad Safety Act, the Railroad Retirement Act, the Hours of Service Act, the Federal Employers' Liability Act, and the other federal railway laws have historically applied to LIRR as a part of this network is not in issue. LIRR has at all times prior to February 8, 1980, considered itself a carrier subject to all of these laws (Pet. App. 35a-36a). As the district court stressed in its opinion, "in the dispute which lies at the heart of this action, the Railroad has affirmatively sought to invoke the collective bargaining and mediation procedures set out in the [Railway Labor] Act, including the establishment of a Presidential Emergency Board" (Pet. App. 36a).

The decision below holds that the LIRR is immune from the the Railway Labor Act on the ground that the operation of the LIRR is an exercise of the state's

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75% of loaded freight cars are currently handled by more than one carrier, improved equipment utilization and reliability is a goal that transcends the individual roads and applies to the entire railroad industry." *National Transportation Trends and Choices*, U.S. Department of Transportation, at 183 and 203.

[26] The interdependence of the railroad operations within this network is illustrated by the recognized need to maintain the continuous flow of cars within the pool. It was noted in *Allegheny-Ludlum*, *supra*, at 743-744, that the operation of the mechanics of the car-pool system contributed to the chronic shortage in the national supply of freight cars. The ICC procedure for establishing the incentive per diem charge to spur prompt return of outstanding cars was unsuccessfully challenged by LIRR in *Long Island Rail Road* v. *United States*, 318 F. Supp. 490 (E.D.N.Y. 1970).

sovereignty. In so concluding, the decision runs directly counter to the decisions of this Court, holding that interstate railroads, although owned and operated by a state, are nevertheless subject to federal railway legislation, including the Railway Labor Act. *California* v. *Taylor*, 353 U.S. 553; *United States* v. *California*, 295 U.S. 175; and *Parden* v. *Terminal R. Co.*, 377 U.S. 184. This line of decisions was reaffirmed in *National League of Cities*, 426 U.S. 833, 854, n. 18.[27] *See also Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 422 (Chief Justice Burger, concurring opinion).

Taylor sets to rest any doubt that the operation of a state-owned interstate railroad is constitutionally subject to the Railway Labor Act. The Court in *Taylor* described the Act as "essentially an instrument of industry-wide government." 353 U.S. at 565. It explained:

> The railroad world for which the Act was designed has been described as a 'state within a state. Its population of some three million, if we include the families of the workers, has its own customs and its own vocabulary, and lives according to the rules of its own making .... This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its

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[27] Note 18 of *National League* reads:

> The holding of *United States* v. *California*, as opposed to the language quoted in the text, is quite consistent with our holding today. There California's activity to which the congressional command was directed was not in an area that the States have regarded as integral parts of their governmental activities. It was, on the contrary, the operation of a railroad engaged in "common carriage by rail in interstate commerce ...." 297 U.S., at 182.
>
> For the same reasons, despite MR. JUSTICE BRENNAN'S claims to the contrary, the holdings in *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), and *California* v. *Taylor*, 353 U.S. 553 (1957), are likewise unimpaired by our decision today.

> component parts, the reign of law has been firmly estabilised . . .'. [t]he fact that, under state law, the employees of the [state-owned and operated] Railroad may have no legal right to strike reduces, but does not eliminate, the possibility of a work stoppage. It was to meet such a possibility that the [Railway Labor] Act's 'reign of law' was established. A terminal railroad facility like the [state-owned] Belt Railroad is a vital link in the national transportation system. Its continous operation is important to the national flow of commerce.

355 U.S. at 565-66 (footnote and citations omitted).

The factual situation to which the Court in *California* v. *Taylor* referred is essentially parallel to that of this case. The New York Taylor Law, as its record shows since its inception, only "reduces, but does not eliminate, the possibility of a work stoppage."[28] *Id.* The "reign of law" under the Railway Labor Act, which, when enacted, was a composite of the major voluntary features of railway labor laws and practices, dating from 1888, has served to avoid interruptions to the flow of interstate rail freight throughout the country and in New York as well.

The railroad world which the *Taylor* decision describes came into existence as the national railroad network

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[28] The records of the New York Public Employment Relations Board show that during the period September 1967 to December 31, 1980, there were 279 strikes by public employees subject to the Taylor Law, with an estimated 4,105,000 work days idle (Pet. App. 77a), and in the case of public transit employees subject to that law, nine strikes, causing 370,500 idle work days. *Id.*

In contrast, there was a single work stoppage by employees of LIRR (November, 1972) between the *fiscal* years 1965 (when LIRR was purchased by the state) and 1980 (and prior to December 7, 1979 when this action was filed), causing 175,000 idle work days (*see* Pet. App. 81a). The dispute which gave rise to this case resulted in a six-day strike in December, 1979, by employees represented by petitioner and a two day strike in April, 1980, by other LIRR employees, together causing 24,000 man days lost (*Id.*).

began its accelerated evolution in the late 19th century, closely aligned with the changes and growth in the United States during that period. As the rail network developed and began to dominate important segments in the American economy, problems of "rate wars, price fixing, secret rebates to favored shippers, bankruptcies, financial swindles, blatant political bribery, discrimination between long-haul and short-haul shippers, [and] indiscriminate handing out of free railroad passes" contributed to the general instability of the young industry, evoking the attention of both the state and national legislatures.[29] In the two years prior to 1887, 150 bills to create some form of government regulation of railroads were introduced in the Congress. *Id.*

Along with this growing lack of public confidence in the management of the railroad industry, the operating brotherhoods of railway employees, predecessors to petitioner UTU, began as early as 1860 to organize operating employees in response to the hazardous conditions in the occupation of running these early railroads.[30] The last quarter of the nineteenth century was a particularly bloody labor relations period, marked by the nationwide rail strike of 1877, and the great Pullman strike of 1894. *Id.*, at 10.

The Act to Regulate Commerce of 1887 (the Interstate Commerce Act), creating the Interstate Commerce Commission, represented the first significant federal response to the growing national concern over the protection of the public interest from the excesses of the railroads in their developing monopolies. Federal presence in the railroad industry began at this point and has persisted ever since, resulting in laws covering a wide range of pressing needs

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[29] J. Haar, *The Great Railway Crisis, An Administrative History of the United States Railway Association* (National Academy of Public Administration, 1978) at 5.

[30] *Id.*, at 9.

involving rate structures, division of rates, car-pooling, utilization of freight cars, rail safety, mergers, abandonments, employment relations and stability, retirement, and, of course, the movement of interstate freight without interruption.[31]

Railroad growth peaked during the second decade of this century with approximately 254,000 miles of line, representing the largest rail network in world.[32] The federal presence in the industry expanded in proportion to this enormous growth. Coordinate with the gradual strengthening of the ICC, and the growth of the early railroad laws, both state and federal, responding to the needs of shippers, farmers, and the needs of the railroads themselves, was the growth of the early federal labor relations laws, such as the Arbitration Act of 1888, the Erdman Act of 1898, the Newlands Act of 1913, the Adamson Act of 1916, and the Transportation Act of 1920.[33]

In 1919, Samuel O. Dunn, the editor of *The Regulation of Railways*, wrote that "the improvement of our policy of regulation of railways is the only alternative to government ownership." [34]

During 1923-24, the federal administration under Presidents Harding and Coolidge asked for improvement in the Transportation Act of 1920, to remedy shortcomings particularly in the area of labor management relations. *The Railway Labor Act at Fifty*, *supra*, at 7. It was in this context that the Republican Party platform of 1924 proposed the enactment of a Railway Labor Act, stating:

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[31] *Id.*, at 4-9.

[32] *Id.*, at 11.

[33] *The Railway Labor Act at Fifty*, National Mediation Board, (G.P.O., Washington, D.C. 1976), at 3-7.

[34] Samuel O. Dunn, *The Regulation of Railways* (New York: D. Appleton and Co., 1919), at 19.

> Collective bargaining, mediation, and voluntary arbitration are the most important steps in the maintaining of peaceful labor relations and should be encouraged. We do not believe in compulsory action . . . Therefore the interests of the public require the maintenance of an impartial tribunal which can in an emergency make an investigation of the facts and publish its conclusions.[85]

In 1925, a committee of railway executives met with a committee of union representatives and, under the urging of President Coolidge, produced a draft of a bill which ultimately became the Railway Labor Act. *Id.*, at 8. Donald R. Richberg, one of the authors of the draft, in his testimony on the bill said:

> I want to emphasize again that this bill is the product of a negotiation between employers and employees which is unparallelled, I believe, in the history of American industrial relations.
>
> For the first time representatives of a great majority of all the employers and all the employees of one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community. They are now asking to have this agreement written into law, not for the purpose of having governmental power exerted to compel the parties to do right but in order to obtain Government aid in their cooperative efforts and in order to assure the public that their interest in efficient continuous transportation service will be permanently protected.[86]

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[85] *The Railway Labor Act at Fifty*, *supra*, at 7.

[86] *Railway Labor Disputes*, Hearings Before the House Committee on Interstate and Foreign Commerce, 69th Congress, 1st Session, (1926) at 9.

The result of this effort was the Railway Labor Act of 1926, which, as amended from time to time, has served as the basis for labor management harmony and industrial peace in the railroad industry.

In *Railroad Trainmen* v. *Jacksonville Terminal Co.*, *supra*, the Court said, in upholding the preemptive effect of the Railway Labor Act on state anti-strike laws:

> Both before and after enactment of the Railway Labor Act, as well as during congressional debates on the bill itself, proposals were advanced for replacing this final resort to economic warfare with compulsory arbitration and anti-strike laws. But although Congress and the Executive have taken emergency *ad hoc* measures to compel the resolution of particular controversies, no such general provisions have ever been enacted. And for the settlement of major disputes, 'the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration'.

394 U.S. 369, 379-380 (footnotes and citations omitted).

In its comments upon this history in *Detroit, Toledo & Shoreline R.R. Co.* v. *UTU*, *supra*, 396 U.S. at 148, 149, this Court recognized that the most significant element of the Railway Labor Act's machinery for preventing wasteful strikes was the leverage given to the parties and to the government "to make the exhaustion of the Act's remedies an almost interminable process". *See*

also Railway Clerks v. *Florida E.C.R. Co.*, 384 U.S. 238, 246. In the instant case, 22 months of mediation, negotiation and Presidential Emergency Board intervention under the long drawn out procedures of the Act produced an accord (Pet. App. 6a, n.6).[37]

It is this long-term federal presence in the railroad world, responding to the national interest in the uninterrupted operation of the rail network in its entirety and not the state's interest in the functioning of its recently acquired freight and commuter railroad, which is deeply rooted as a traditional governmental activity. *See* discussion, *infra*, at 40-42. Obviously, this national concern extends to all railroads in the interwoven national system, mainline or short-line, privately owned or publicly owned, without distinction. This is the basis for this Court's rejection of California's argument in *Taylor*, that the federal railroad laws do not apply to state-owned railroads. *Id.*, at 25.

In the instant case, there can be no doubt that the economic character and significance of LIRR, character-

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[37] The effectiveness of the Act's mediatory process in the instant case was undoubtedly chilled by the tactic of LIRR and MTA to employ as their final weapon a state court Taylor Law injunction to forestall a possible stoppage. The chilling effect of that tactic was described by the National Mediation Board ("NMB") in its order of March 9, 1981, interpreting the decision of the Court below as superimposing Taylor Act sanctions on Railway Labor Act procedures:

> The statutory scheme is a comprehensive plan. Its components cannot be segregated and still have meaning. The possibility of the Board's terminating its mediatory services, with the consequences which flow from such action, is as much a part of this mediatory process as anything else. Yet by superimposing the Taylor Law anti-strike provisions upon the Board's mediatory services, the Court destroys the only real power that this Board has to induce compromise and ultimate agreement by the parties.

Pet. App. 70a (footnotes omitted).

ized by the court below as "a crucial physical link with other interstate rail carriers in the movement of interstate freight" (Pet. App. 9a), is at least as substantial as that of the state owned and operated railroads in *Taylor* and the related cases.

The court below sets aside the *Taylor* line of cases on the ground that the LIRR carries not only freight, but also a considerable number of commuter passengers. But the *Taylor* cases cannot be set aside on that ground.[38] The national concern in maintaining the free flow of interstate commerce over the nationwide rail network, including its integral branches and tributaries, cannot permit a distinction based on the volume of interstate freight carried, or on the additional carriage of commuters, or on the relative volume of the two services.[39]

Whatever the volume of LIRR's passenger service the inescapable fact is that the Long Island Rail Road, according to its ICC reports, moved more than 70,000 loaded freight cars on its through trains in 1979 and more than 50,000 loaded freight cars on its way trains (Statement of the Case, Part E, *supra*, at 11), over a distance of more than 2 million train miles, inclusive of empty freight cars (J.A. 56), and serves as the "necessary physical link with other railroads in the movement of a heavy volume of interstate rail freight" (Pet. App. 35a), regardless of the additional passenger function which it performs. It has long been settled that:

> The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount au-

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[38] In expressly confirming *Taylor* and the related railroad cases, *National League* cautions that "[t]he holding of *United States* v. *California*, as opposed to the language quoted in the text, is quite consistent with our holding today." 426 U.S. at 854, n.18.

[39] In this connection it should be noted that 53 of approximately 200 of the nation's urban centers border on or cross state lines. *See* H.R. Rep. No. 204, 88th Congress, 1st Sess. (1963), at 5.

> thority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care.

Shreveport Rate Case, supra, 234 U.S. at 351. Justice Rehnquist, in noting in his concurring opinion in *Hodel* v. *Virginia Surface Mining Association*, —— U.S. ——, 49 U.S.L.W. 4654, that "Congress' power under the Commerce Clause is broad indeed" (*Id.*, at 4665), referred, *inter alia*, to *Shreveport*, in which this Court declared that the commerce power included the power "to control . . . all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Shreveport Rate Case, supra*, 234 U.S., at 351. "The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.'" *Id.*, at 350.

The engagement of a state in historically private business activities "with a close and substantial relation to interstate traffic" is no more shielded from the commerce power than was the intrastate activity in *Shreveport*. Whenever the interstate and intrastate commuter transactions of carriers are so related as here "that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." *Id.*, at 351-352.

In recognition of special problems in the public sector of railroad commuter operations, Congress has this year amended the Railway Labor Act by providing specialized and complex "final offer" procedures for the resolution of disputes on state-owned and operated commuter railroads.[40] The 1981 amendment prolongs what this Court has already characterized as the "interminable process" under Section 6 of the Act by imposing an additional 240-day moratorium period for the operation of the new dispute settlement machinery, following the exhaustion of the currently required Section 6 procedures. The amendment requires the President, upon the request of a party or a governor of any affected state, to create not only a Presidential Emergency Board described in Section 10 of the Act, but, absent resolution of the dispute upon conclusion of this first phase, a *second*, final-offer selection Presidential Emergency Board. The moratorium period for the First Emergency Board mediation is extended from 60 days to 120 days. The second final-offer selection Emergency Board mandated by the 1981 amendment occupies an additional 120-day moratorium period to permit the Board to select the more reasonable of the parties' final offers, for recommendation to the President, constituting a total of 240 days overall beyond the "interminable process" of the conventional Section 6 procedures. If the employees engage in a work stoppage after rejecting the selected final offer, they will forfeit benefits under the Railroad Unemployment Insurance Act. A work stoppage following a carrier's rejection of the selected final offer operates as a forfeiture of benefits under any mutual aid pact which it may have. *Id.*

The overriding need for a continuing federal presence in response to national concerns over the free flow of interstate rail traffic throughout the entire network, as exemplified by the 1981 amendment, must be held to

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[40] Omnibus Budget Reconciliation Act of 1981, Title XI, § 1157, App. F, *infra*, at 8a.

predominate over the interest of a State in maintaining local rail service. The State's interest in providing commuter service to short-haul passengers by a conventional interstate railroad serving an area as large as Long Island can hardly be deemed to involve the performance of historical functions " 'essential to [the] separate and independent existence' " of the State. *National League of Cities, supra*, 426 U.S. at 845. The fact that the service performed by this railroad for these commuters, among others, is important or even essential to the short-haul passengers of Queens County or of the nearby parts of Nassau County, upon which the Court below relied so heavily, cannot be relevant to the larger issues of constitutional immunity. The States cannot determine their own immunity by penetrating into conventional business areas with declarations of essentiality. The operation of this interstate railroad does not fall within an area that the States have historically regarded as integral parts of their sovereign attributes. The LIRR, as described above, is "a railroad engaged in 'common carriage by rail in interstate commerce' ", as the courts below concluded, and its amenability to federal process is clearly established by the *California* v. *Taylor* line of cases within the four corners of the footnote 18 of *National League of Cities, supra*, at 854.

II. THE OPERATIONS OF THE LIRR DO NOT MEET THE REQUIREMENTS, NECESSARY UNDER *NATIONAL LEAGUE OF CITIES v. USERY*, TO ESTABLISH A CLAIM OF TENTH AMENDMENT IMMUNITY.

In discounting the pertinence of *Taylor* and other railroad decisions of this Court discussed *supra*, the court below misconceived the expressed rationale of *National League of Cities*, expounded in repeated affirmations in that decision of the narrow limits upon the State's immunity under the Tenth Amendment.

These limits, which are expressed in slightly varying formulations throughout the *National League* opinion, *see, e.g.*, 426 U.S. at 846, 848-49, 850, 851, 852, 853, 853-54, 855, and notes 16, 17, and 18, at 851, 852, and 854, respectively, were recently summarized by this Court in *Hodel* v. *Virginia Surface Mining Association*, —— U.S. ——, 49 U.S.L.W. 4654, 4660:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States' *Id.*, at 854. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty'. *Id.*, at 845. And third, it must be apparent that the State's compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Id.*, at 852.

The instant claim meets none of these three requirements.[41]

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[41] The argument on the State-as-State requirement necessarily overlaps the argument on the two other requirements of *National League* as formulated in *Virginia Surface Mining*, *supra*. We therefore leave further discussion of the point to sections above dealing with those two requirements. We submit at the outset, however, unlike the Fair Labor Standards Amendments of 1974 (88 Stat. 55), specifically imposing wage-and-hour standards upon all state activities (except as to elected officials and their immediate appointees), the Railway Labor Act does not address itself to States as States. Like the other related federal labor laws (Statement of the Case, Part E, *supra* at 12, n.13), the Railway Labor Act address itself simply to railroads, with the intent to establish a uniform collective bargaining procedure for the protection of the national rail network from interruptions on any of its interlocking segments. "A strike in one State often paralyzes transportation in an entire section of the United States and, transportation labor dis-

1. Since the underlying premise of *National League* is "that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress", (426 U.S. at 845), we turn first to the second of the requirements as listed in *Virginia Surface Mining, supra*: that the federal regulations challenged under the Tenth Amendment "must address matters that are indisputably 'attributes of state sovereignty' ". 49 U.S.L.W. at 4659-60.

Obviously, "state sovereignty" does not encompass every activity in which a state chooses to engage. The Court made that clear in *National League*, in expressly confirming the continued authority of the earlier decisions denying sovereign immunity with respect to the state-owned railroads in *California* v. *Taylor*, 353 U.S. 553, *United States* v. *California*, 297 U.S. 175, and *Parden* v. *Terminal R. Co.*, 377 U.S. 184. 426 U.S. at 854-55, n. 18. What is determinative, the Court said in *National League*, is whether the particular activities claimed to be immune are "functions essential to separate and independent existence" of the State. 426 U.S. at 845; *see also Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 423 (concurring opinion, Chief Justice Burger).

The public operation of an interstate freight and passenger railroad, whether or not it is deemed to be important to the State or to the community, is not a function essential to the separate and independent existence of the State *qua* State. For most of the time since the founding of the Republic, the States have existed and have functioned as sovereigns without own-

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putes frequently result in simultaneous work stoppages in many States." *Railroad Trainmen* v. *Jacksonville Terminal*, 394 U.S. 369, 381. It matters not whether the railroad causing the interruption is privately owned or state owned. The result is the same.

ing or operating interstate railroads, and even in more recent times, few if any, apart from New York, find it appropriate to engage in railroading directly.[42] Nor did New York find it appropriate to designate the LIRR as a public benefit corporation, until February 8, 1980, following the filing of the complaint in this case.

A sovereign may, of course, enter into any commercial activity it chooses (absent constitutional interdiction), but its decision to do so does not make that activity a sovereign function immune from otherwise constitutional action of the federal government. In the field of the taxing power (long recognized as "the power to destory"),[43] this Court has denied immunity to a State-operated elevated railway (and therefore to its officers), holding that the provision of transportation services by the City of Boston "[was] distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State". *Helvering* v. *Powers*, 293 U.S. 214, 227. The Court summarized the point as follows:

> [T]he State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend. *The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity . . . . The necessary*

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[42] In *California* v. *Taylor*, *supra* at 563-564 (1956), the Court noted: "We are told by the parties that there are today thirty public owned railroads, all of which are switching or terminal roads and only eleven of which are operated directly by the public." *See also Transit Fact Book*, American Public Transit Association (1979), at 75.

[43] *McCulloch* v. *Maryland*, 4 Wheat 316.

> *protection of the independence of the state government is not deemed to go so far.*

Id., at 225, (citations omitted, emphasis added).

Even in the exercise of the state's constitutional police powers—the control of the local liquor traffic, if the state chooses to take over the sale of liquor instead of to regulate it, it subjects itself to the federal taxing power. *Ohio* v. *Helvering*, 292 U.S. 360; *South Carolina* v. *United States*, 199 U.S. 437. "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader . . . ." *Ohio* v. *Helvering*, at 369.

Were it otherwise, it would follow that any constitutional federal regulatory program responding to the national interest could be frustrated, within the boundaries of any given state, by the state's taking over the activity sought to be regulated. In the recent *Virginia Surface Mining* case, the Court upheld the constitutionality of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. Sec. 1201 *et seq.* (1976 Ed., Supp. III), in its application to privately owned coal mines (*supra*, 49 U.S.L.W. 4654). The Court cited the Congressional finding that many surface mining operations adversely affected interstate commerce " 'by counteracting governmental programs and efforts to conserve soil, water, and other natural resources' ". *Id.*, at 4657. Had the State of Virginia deemed it essential, in the local interest, to take over the surface coal mines, as the State of New York did the LIRR, it could hardly have been constitutionally empowered, as a sovereign owner, to engage in the very same activities even though they "counteract[ed] governmental programs and efforts to conserve [the Nation's] natural resources".[44] No theory of the federal-state relationship countenances an encroachment of this magnitude on a subject so clearly com-

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[44] *Cf. Jacksonville Terminal, supra*: " '[I]t would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme' ". 394 U.S. at 381.

mitted by the Constitution to the judgment of Congress in the national interest.

2. A further requirement of the Tenth Amendment immunity, as defined by *National League*, is a showing "that the State's compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.'" *Virginia Surface Mining*, *supra*, 49 U.S.L.W. at 4660. The instant claim falls far short of meeting this requirement.

The operation of the LIRR is not an "integral operation" of the government of New York in any meaningful sense of the term. The LIRR operates today precisely as it did before the respondent MTA acquired ownership of its stock from the Pennsylvania Railroad in 1966. Its organization was not absorbed into the government structure, and decisions in connection with the provisions of service were not moved into levels of traditional statecraft. The railroad's officers and employees were excluded by state law from the category of "public officer or employee".[45] It was not until after the complaint was filed in this case that respondents "changed their posture completely by converting the railroad from a private stock corporation to a public benefit corporation whose employees would be facially subject to the Taylor Law" as public officers and employees (Pet. App. 31a).

At all times from the takeover to the present day, the LIRR has continued to operate in the same manner as any other Class I railroad and in the same manner as it has done throughout its history. In the words of the then Vice-President for Public Relations, James A. Schultz, "Absolutely nothing has changed . . . we just have a new owner and a new board of directors. We're under the

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[45] The laws of New York provide that "[n]otwithstanding any provisions of the civil service law, no officer or employee of a subsidiary corporation of the authority [the MTA], other than a public benefit subsidiary corporation, shall be a public officer or a public employee." N.Y. Public Authorities Law, sec. 1265, as amended by Laws of 1965, ch. 634.

Railway Labor Act, just as we've always been. The people do not become state employees, they remain railroad employees and retain all the benefits and drawbacks . . ." (App. E, *infra*, at 6a).

In sum, the changeover was simply a change in ownership; the railroad continued to play its accustomed role as an element of the national rail network in the transmission of interstate freight. To say that it became an "integral" part of government merely because the State has become its owner would extend the term "integral" to include public enterprises of all descriptions and would deprive the term, so frequently stressed in *National League*, of any limiting effect.

Likewise, the equally stressed term "area of traditional governmental functions" can have no application to the operation of railroads. The United States has had a long and consistent tradition of leaving the ownership and operation of railroads to the private sector, and limiting governmental intervention to grants, subsidies, and regulation.[46] That the State of New York chose in 1966 to depart in some degree from the historical and still pervasive practice, and to undertake the operation of an interstate railroad, hardly creates a tradition, any more than does the recent entry of several states into the business of running games of chance. Tradition cannot mean current practice, if substance is to be accorded to the term as used in *National League*. Nor in any event can we have one "tradition" in New York and another tradition in the remaining 49 states for the purpose of delimiting the scope of the federal authority to deal with labor disputes in the railroad industry on a nationwide basis.

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[46] J. Harr, *The Great Railway Crisis, an Administrative History of the United States Railway Association*, (National Academy of Public Administration, 1978) at 3-8.

Accordingly, this Court in *National League*, took pains to make clear that its prior decisions in the railroad cases continued to be authoritative (426 U.S. n. 18, at 854), stressing in particular that in *United States* v. *California*, 297 U.S. 175, the operation in question was that of a railroad engaged in "common carriage by rail in interstate commerce . . ." and was for that reason "not in an area that the States have regarded as integral parts of their governmental activities . . ." See also the concurring opinion of the Chief Justice in *Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389, 424, referring particularly to the public supply of electric power and to the public provision of railroad transportation, "It should be evident . . . that the running of a business enterprise is not an integral operation in the area of traditional government functions".

Even apart from the foregoing considerations, the LIRR's claim to *National League* immunity fails to meet the basic requirement that "compliance with the federal law would directly impair [the States'] ability 'to structure [their] integral operations . . .' ". *Virginia Surface Mining*, 49 U.S.L.W. at 4660; *National League of Cities*, 426 U.S. at 852.

The "ability to structure integral operations", which may not be impaired, must of course refer to something more specific than the ability to depart from federal standards. In *National League*, the ability found to be impaired was the ability of the States to make their own "policy choices . . . as to how they wish to structure pay scales in state employment". 426 U.S. at 848. Specifically, the Court noted, the States were forbidden by the federal law to pay less than rates prescribed by Congress or to adopt overtime schedules "on terms different from those which Congress has sought to impose". *Id.*, at 849. It was this Congressional attempt "to prescribe [the] minimum wages and maximum hours to be

paid by the States in their capacities as sovereign governments" which was held to constitute the impermissible impairment. *Id.*, at 852. By limiting States' choices in the setting of terms of employment to be offered for the services of their employees, the federal government, it was deemed, had sought to supplant the States *pro tanto* in the exercise of their sovereign functions.

The Railway Labor Act, in contrast, imposes no substantive standards limiting the railroads in the terms of employment they can offer. While the Act calls for collective bargaining, it "does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them" (*Texas & New Orleans R. Co.* v. *Railway and Steamship Clerks*, 281 U.S. 548, 571) and "does not undertake to compel agreement between the employer and [the] employees" (*Virginia Ry. Co.* v. *System Federation 40*, 300 U.S. 515, 548). It merely requires the parties to confer and negotiate, in recognition of the fact that "in the case of carriers, experience has shown that . . . when there was a willingness . . . to meet . . . representatives for a discussion of [the employees'] grievances, . . . strikes had been avoided." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45. The choice still remains with the railroad, private or public, to decide what terms it is prepared to grant. The "direct displacement" which is the essence of the unconstitutional intrusion found in *National League* does not occur.[47]

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[47] *Cf. Peel* v. *Florida Department of Transportation*, 600 F.2d 1070 (5th Cir. 1979) applying the Veteran's Reemployment Act, 32 U.S.C. 2021-6, to State employers, in which the Fifth Circuit rejected the argument "that the reemployment provisions of the Act 'directly displace the State's freedom to structure integral operations in areas of traditional functions' " (at 1083). *See also Pearce* v. *Wichita County*, 590 F.2d 128 (5th Cir. 1979), holding that Congress may constitutionally impose the provisions of the Equal Pay Act, 29 U.S.C. 206(d), on state employers. Under provisions of the EPA, the state would be required to raise the pay of women employ-

The policy of the federal Act deems the potential of ultimate strike or lockout to be indispensible to effective collective bargaining, and therefore to the long-term maintenance of industrial peace in the railroad sector. *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 380-81. The policy of the state law, on the other hand, deems it necessary to provide an absolute prohibition of strikes in the public sector.[48] The court below reasoned that the freedom to strike under the federal policy may require "the State to pay higher wages in order to avert the devastating economic injury that a halt in the commuter transportation system would cause" and thereby impairs the State's ability to function as a sovereign (Pet. App. 15a).[49]

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ees to that of men doing equal work (section 206(d)(1)); but the Fifth Circuit deemed "[t]he ability to pay female employees less than those paid to male employees is not among the 'functions essential to [the] separate and independent existence' of the States' ". 590 F.2d at 132.

[48] As already pointed out, the New York Taylor Law, like the California anti-strike law in *California* v. *Taylor*, *supra*, "reduces, but does not eliminate, the possibility of a work stoppage". 353 U.S. at 566. The record of man-days lost through work stoppages prohibited by the Taylor Law shows that the New York law is in this respect less effective than the Railway Labor Act. *See* note 28, *supra*, at 26.

[49] *But see Virginia Surface Mining*, *supra*, 49 U.S.L.W. 4661, n.33:

> The remaining justification asserted by the District Court for its Tenth Amendment ruling, one that appellees urge here, is that the steep-slope mining requirements will harm Virginia's economy and destroy the taxing power of some towns and counties in the Commonwealth. In this regard, the court may have been influenced by the discussion in *National League of Cities* about the likely effects of the challenged regulations on the finances of State and local governments. *National League of Cities* v. *Usery*, *supra*, at 846-847. But as the Court made clear, the determinative factor in that case was the nature of the federal action, not the ultimate economic impact on the States. *Id.*, at 847. Moreover, even if it is true that the Act's

But the difference between the federal and state policies with respect to the right to strike is not an unconstitutional intrusion into the area reserved exclusively to the States under the Tenth Amendment. It is a difference of judgment, in a field of overlapping jurisdiction, of no more Tenth Amendment significance than that considered in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 and in related federal preemption cases,[80] which under the Supremacy Clause must be resolved in favor of the federal legislation. *Virginia Surface Mining*, *supra*, 49 U.S.L.W. at 4660. "It was for Congress to make the choice of the means by which its objective of securing the uninterrupted service of interstate railroads was to be secured, and its judgment, [is] supported . . . by our long experience with industrial disputes, and the history of railroad labor relations . . .". *Virginia Ry. Co.* v. *System Federation 40*, *supra*, 300 U.S. at 553.

The choice made by Congress in the Railway Labor Act was to preserve the right of ultimate application of economic force as a catalyst and determinant of serious bargaining in order to achieve long term peace through-

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requirements will have a measurable impact on Virginia's economy, this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment.

[80] This Court has consistently held "that federal labor legislation, encompassing as it does all industries 'affecting commerce' ", overrides state public utility policies (*Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 391), designed to ensure, as in New York under its Taylor Law, an uninterrupted supply of " 'essential public utility service' . . . [covering] . . . water, heat, gas, electric power, public passenger transportation and communications." *Id.*, at 388. In its communication of this principle, the Court noted that "[t]he courts of appeal have uniformly held enterprises similar to and no more important to interstate commerce than the Milwaukee gas and transit companies before us in these cases subject to the provisions of the federal labor law." *Id.*, at 391 (footnote omitted). *A fortiori*, the state interest in maintaining service on LIRR whose "freight service supplies a critical link in the transportation of goods both to and from points throughout the continental United States and Canada" (Pet. App. 34a) cannot be held to override the strong national interest expressed in the Railway Labor Act.

out the national rail network. More specifically, "[t]he Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in *any* self-help." *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 381. This Court thought it:

> clear . . . that . . . [t]he disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in face of a strike.

Id., at 380-81. Obviously, the incentive to reach agreement inherent in the potential of the adversary's economic force does not lose its importance when the owner of the railroad is a public body.

In any event, the choice was made by Congress to preserve the two-sided right of ultimate economic pressure. The contrary choice of a particular State, wise or not, must give way. "The determination of the permissible range of self-help 'cannot be left to the laws of the many States, for it would be fatal to the goals of the Act' if conduct were prohibited by state laws 'even though in furtherance of the federal scheme' ". *Jacksonville Terminal*, *supra*, 394 U.S. at 381. As the Court in *Jacksonville* emphasized, a strike in one state affects the movement of freight from and to other states, and railroad disputes "typically present problems of national magnitude" and often "result in simultaneous work stoppages in many states". *Id.* " 'The needs of the subject matter manifestly call for uniformity'." *Id.*, at 381 (citations omitted).[51]

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[51] Conceding *arguendo* that each of the three requirements of *National League of Cities* has been satisfied in this case, nonetheless, as *Virginia Surface Mining*, *supra*, at 44, n.48, cautions, it does not follow that respondents' Tenth Amendment challenge to

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

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September 1981

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the Railway Labor Act should succeed. Here, the national interest in the uninterrupted operation of the national rail network in its entirety, expressed in the Railway Labor Act and in the related railroad laws, should, on balance, predominate against the local interest of a State in providing rail passenger service to commuters such as those on Long Island. The nature of the federal interest in ensuring the uninterrupted movement of interstate rail traffic through a gateway as significant as New York and indeed throughout the entire rail system is so well established and of such significance to all parts of the national economy that it must be held to prevail over the parochial needs of a group of commuters, in a segment like Long Island, to whom other modes of transportation must be available. However, since respondents have clearly failed to satisfy any of the criteria without which its Tenth Amendment challenge cannot succeed, further consideration of this point does not appear to be required.

APPENDICES

APPENDIX

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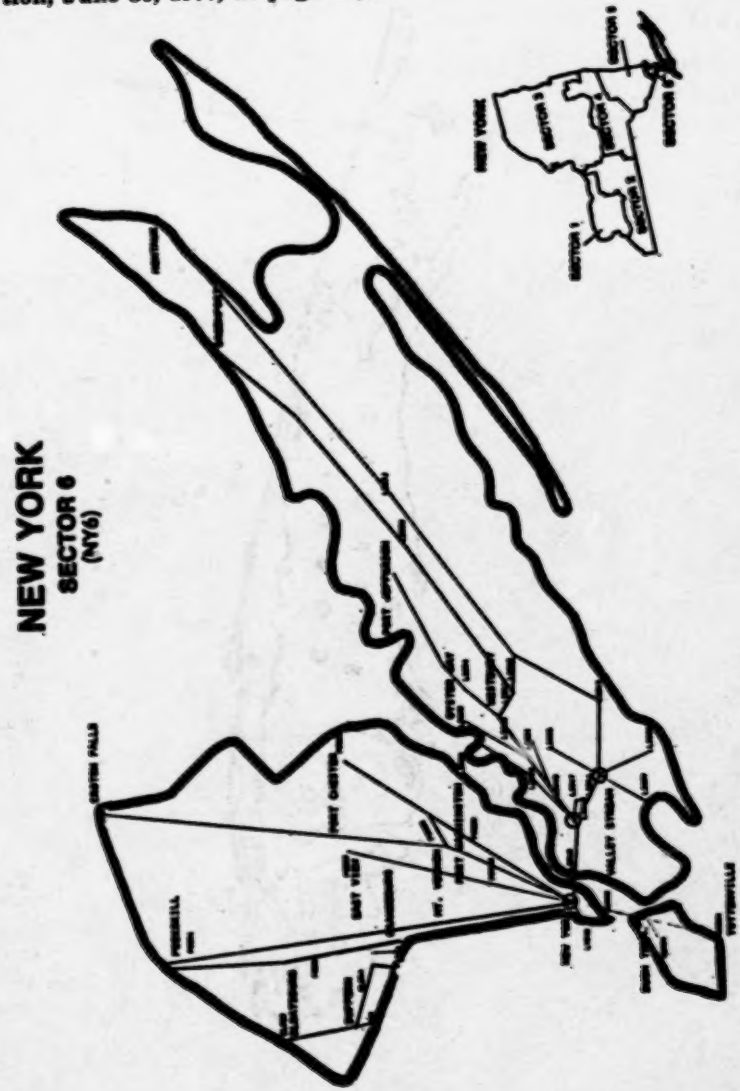
APPENDIX A

Counties of Long Island

APPENDIX B

Rail Sector Maps—*Final Standards, Classification, and Designation of Lines of Class I Railroads in the United States,* Vol. II (publication of the U.S. Department of Transportation, June 30, 1977, at page 88).



APPENDIX C

Section 10, Railway Labor Act, as Amended, 45 U.S.C. 160

EMERGENCY BOARD

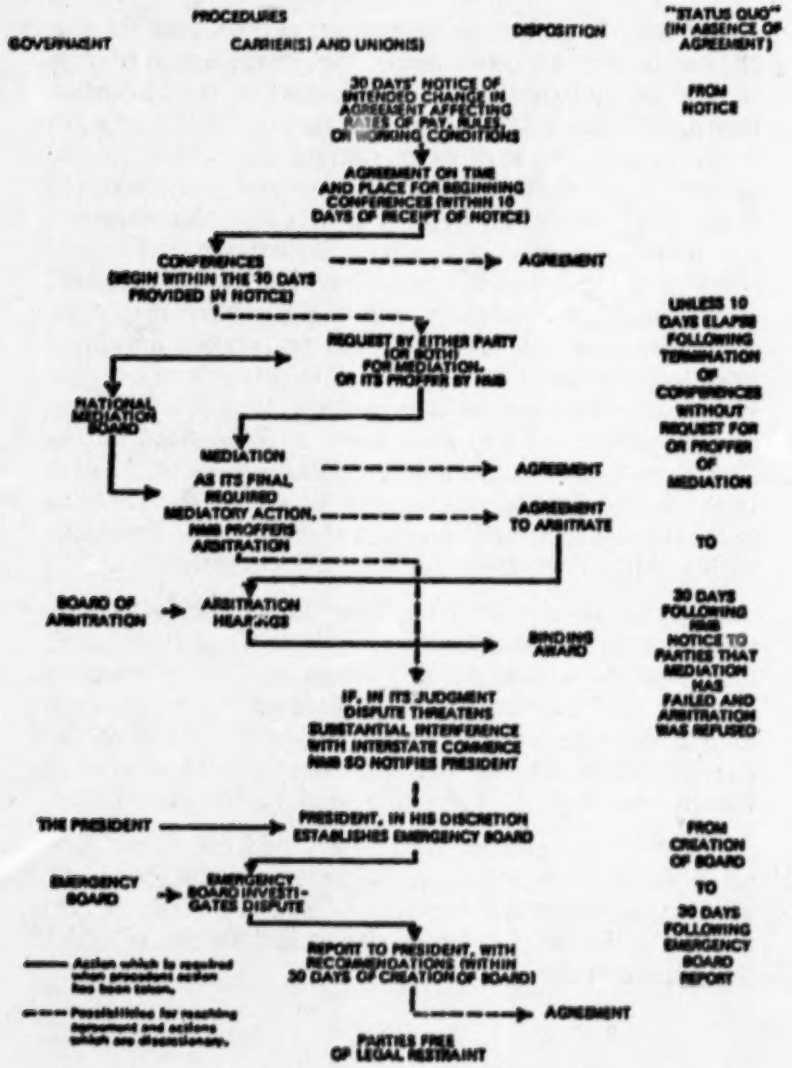
SEC. 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however*, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

APPENDIX D

Railway Collective Bargaining Procedures and "Status Quo" Periods Under the Railway Labor Act


PROCEDURES
GOVERNMENT
CARRIER(S) AND UNION(S)
DISPOSITION
"STATUS QUO" (IN ABSENCE OF AGREEMENT)
30 DAYS' NOTICE OF INTENDED CHANGE IN AGREEMENT AFFECTING RATES OF PAY, RULES OR WORKING CONDITIONS
FROM NOTICE
AGREEMENT ON TIME AND PLACE FOR BEGINNING CONFERENCES (WITHIN 10 DAYS OF RECEIPT OF NOTICE)
CONFERENCES (BEGIN WITHIN THE 30 DAYS PROVIDED IN NOTICE)
AGREEMENT
UNLESS 10 DAYS ELAPSE FOLLOWING TERMINATION OF CONFERENCES WITHOUT REQUEST FOR OR PROFFER OF MEDIATION
REQUEST BY EITHER PARTY (OR BOTH) FOR MEDIATION, OR ITS PROFFER BY NMB
NATIONAL MEDIATION BOARD
MEDIATION
AS ITS FINAL REQUIRED MEDIATORY ACTION, NMB PROFFERS ARBITRATION
AGREEMENT
AGREEMENT TO ARBITRATE
TO
BOARD OF ARBITRATION
ARBITRATION HEARINGS
BINDING AWARD
30 DAYS FOLLOWING NMB NOTICE TO PARTIES THAT MEDIATION HAS FAILED AND ARBITRATION WAS REFUSED
IF, IN ITS JUDGMENT DISPUTE THREATENS SUBSTANTIAL INTERFERENCE WITH INTERSTATE COMMERCE NMB SO NOTIFIES PRESIDENT
THE PRESIDENT
PRESIDENT, IN HIS DISCRETION ESTABLISHES EMERGENCY BOARD
FROM CREATION OF BOARD
TO
30 DAYS FOLLOWING EMERGENCY BOARD REPORT
EMERGENCY BOARD
EMERGENCY BOARD INVESTIGATES DISPUTE
REPORT TO PRESIDENT, WITH RECOMMENDATIONS (WITHIN 30 DAYS OF CREATION OF BOARD)
AGREEMENT
PARTIES FREE OF LEGAL RESTRAINT
Action which is required when precedent action has been taken.
Possibilities for reaching agreement and actions which are discretionary.

APPENDIX E

New York Times, January 21, 1966, p. 16

STATE TAKES OVER THE L.I. RAIL ROAD

Finishes Paying the Pennsy—Re-elects All Officers

By DOUGLAS E. KNEELAND

New York State went into the railroad business yesterday.

The recently created five-man Metropolitan Commuter Transportation Authority took over the Long Island Rail Road as Dr. William J. Ronan, the authority chairman handed a check for $55 million to the road's outgoing board of directors to complete the purchase. On Dec. 22 the state had made a down payment of $10 million on the $65 million sale price.

Members of the authority immediately assumed their roles as directors and re-elected Thomas M. Goodfellow, the Long Island's president, and all other officers.

Memorandum On Way

However, the $55 million check was placed in escrow until written approval of some aspects of the transfer is received from the Interstate Commerce Commission.

A spokesman for the commission in Washington said the authority and the railroad had been notified that a formal "memorandum of understanding" was on the way. The commission's approval was needed for a new lease permitting the Long Island to continue to use some

Pennsylvania Railroad tracks and for the sale of the entire yard and trackage of the Long Island's Bay Ridge Division and part of the Evergreen Division to the Pennsylvania.

In yesterday's transaction at the railroad's Jamaica offices, the 131-year-old Long Island made the switch to an untried track as smoothly as an express rolling over a punched-out commutation ticket.

For the line's 260,000 daily riders and more than 6,500 employees, there was not a jolt.

"Absolutely nothing has changed," said James A. Schultz, vice president for public relations. "People are pounding the same typewriters and pulling the same switches as they always have."

"We just have a new owner and a new board of directors. We're under the Railway Labor Act, just as we've always been. The people do not become state employes, they remain railroad employes and retain all the benefits and drawbacks of that."

Noting that the authority was considering some modernization of equipment and operating changes, he added that it would take time to accomplish these because "it's not like buying groceries off the shelf—it takes planning."

Surveys Are Awaited

A spokesman for the authority said detailed engineering studies were being awaited on several projects under consideration. These include, he said, the elimination of the Jamaica bottleneck, electrifying the railroad to more distant points, buying new equipment and improving the signal system.

The spokesman said the authority planned to use part of the $200-million bond issue authorized under the enabling act passed last year by the Legislature, to buy

about 500 multi-unit, self-propelled commuter cars so that some of the line's old rolling stock could be scrapped.

He added that the authority was also still considering the possibility of running trains directly through Brooklyn to Manhattan over BMT subway tracks, and of opening a new terminal on the East Side, probably at Park Avenue and 34th Street.

As control of the Long Island passed from the Pennsylvania Railroad to the state, jurisdiction over fare increases was transferred from the Public Service Commission to the Metropolitan Commuter Transportation Authority.

Dr. Ronan reiterated yesterday that the authority planned no fare increases. He explained that a public hearing would have to be held before any were put into effect.

Dr. Ronan also said he would continue as Governor Rockefeller's secretary at an annual salary of $29,875, and would not assume the $45,000 salary to which the chairman of the authority is entitled. "All I need is for somebody to fire me as a secretary," he said with a smile.

In addition to Dr. Ronan, the members of the authority are William A. Shea, William L. Butcher, Bruce A. Gimbel and Eben Payne.

APPENDIX F

**Amendments to the Railway Labor Act,
Pursuant to P.L. 97-35 (August 13, 1981),
The Omnibus Budget Reconciliation Act of 1981, Title XI**

DEFINITIONS

Sec. 1135. (a) As used in this subtitle, unless the context otherwise requires, the term:

* * * *

(4) "Commuter service" means short-haul rail passenger service operated in metropolitan and suburban areas, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations.

* * * *

AMENDMENT TO THE RAILWAY LABOR ACT

Sec. 1157. The Railway Labor Act is amended by inserting immediately after section 9 the following new section:

"SPECIAL PROCEDURE FOR COMMUTER SERVICE

"Sec. 9A. (a) The provisions of this section shall apply to any dispute subject to this Act between a publicly funded and publicly operated carrier providing rail commuter service (including the Amtrak Commuter Services Corporation) and its employees.

"(b) If a dispute between the parties described in subsection (a) is not adjusted under the foregoing provisions of this Act and the President does not, under section 10 of this Act, create an emergency board to investigate and report on such dispute, then any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is

operated may request the President to establish such an emergency board.

"(c)(1) Upon the request of a party or a Governor under subsection (b), the President shall create an emergency board to investigate and report on the dispute in accordance with section 10 of this Act. For purposes of this subsection, the period during which no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose shall be 120 days from the date of the creation of such emergency board.

"(2) If the President, in his discretion, creates a board to investigate and report on a dispute between the parties described in subsection (a), the provisions of this section shall apply to the same extent as if such board had been created pursuant to paragraph (1) of this subsection.

"(d) Within 60 days after the creation of an emergency board under this section, if there has been no settlement between the parties, the National Mediation Board shall conduct a public hearing on the dispute at which each party shall appear and provide testimony setting forth the reasons it has not accepted the recommendations of the emergency board for settlement of the dispute.

"(e) If no settlement in the dispute is reached at the end of the 120-day period beginning on the date of the creation of the emergency board, any party to the dispute or the Governor of any State through which the service that is the subject of the dispute is operated may request the President to establish another emergency board, in which case the President shall establish such emergency board.

"(f) Within 30 days after creation of a board under subsection (e), the parties to the dispute shall submit to the board final offers for settlement of the dispute.

"(g) Within 30 days after the submission of final offers under subsection (f), the emergency board shall submit a report to the President setting forth its selection of the most reasonable offer.

"(h) From the time a request to establish a board is made under subsection (e) until 60 days after such board makes its report under subsection (g), no change, except by agreement, shall be made by the parties in the conditions out of which the dispute arose.

"(i) If the emergency board selects the final offer submitted by the carrier and, after the expiration of the 60-day period described in subsection (h), the employees of such carrier engage in any work stoppage arising out of the dispute, such employees shall not be eligible during the period of such work stoppage for benefits under the Railroad Unemployment Insurance Act.

"(j) If the emergency board selects the final offer submitted by the employees and, after the expiration of the 60-day period described in subsection (h), the carrier refuses to accept the final offer submitted by the employees and the employees of such carrier engage in any work stoppage arising out of the dispute, the carrier shall not participate in any benefits of any agreement between carriers which is designed to provide benefits to such carriers during a work stoppage.".